STATE OF MICHIGAN

COURT OF APPEALS

NACG LEASING f/k/a CELTIC LEASING, LLC, Plaintiff-Appellant,	UNPUBLISHED June 5, 2014
v	No. 306773 Michigan Tax Tribunal
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 00-338928

ON REMAND

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

This case is back before this Court following remand from our Supreme Court. *NACG Leasing v Dep't of Treasury*, ___ Mich ___; ___ NW2d ___ (Docket No. 146234, decided February 6, 2014). In our previous opinion, we reversed the judgment of the Michigan Tax Tribunal ("The Tribunal") ordering plaintiff to pay $414,000 in use tax, $103,500 in penalty, and statutory interest pursuant to the Use Tax Act (UTA), MCL 205.91 *et seq*. *NACG Leasing v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 306773). This Court concluded that the Tribunal improperly imposed use tax on petitioner's purchase and lease of the aircraft because petitioner did not "use" the aircraft as that term is defined by the Use Tax Act (UTA), MCL 205.91 *et seq*. *NACG Leasing*, unpub op at 5. This Court determined that its decision regarding the applicability of the use tax rendered moot petitioner's argument regarding calculation of the use tax. *Id*.

Our Supreme Court granted respondent's application for leave to appeal and thereafter issued a decision in which it noted that the UTA, in MCL 205.92(b), defined "use" in pertinent part as follows:

> [T]he exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. [*NACG Leasing*, slip op at 3.]

Our Supreme Court noted that in light of this definition, it was required to "determine whether petitioner exercised a right or power incident to ownership in Michigan when it executed a lease of the aircraft in question." *NACG Leasing*, slip op at 3. Our Supreme Court reasoned that because the right to allow another person "to use one's personal property is a right incident to

ownership, and a lease is an instrument by which an owner exercises that right, it follows that the execution of a lease" constitutes the use of personal property as that term is defined by MCL 205.92(b). *Id*. at 3-4. Our Supreme Court concluded:

> The execution of a lease in Michigan is the exercise of a right incident to property ownership and, therefore, falls squarely within the statutory definition of "use." We hold that petitioner "used" the aircraft in question for purposes of the UTA when it executed a lease of the aircraft in Michigan, regardless of whether it ever had actual possession of the aircraft. We reverse the judgment of the Court of Appeals and remand the case to that Court to consider petitioner's alternative claim challenging the calculation of the assessment amount. [*Id*. at 6 (footnote omitted).]

We therefore consider petitioner's alternative claim, and conclude that remand to the Tribunal is required.

I. BASIC FACTS AND PROCEDURE

The undisputed facts in this case were set forth in our previous opinion:

> The parties have stipulated to the following facts. Plaintiff[1] was formed as a Michigan limited liability company in 2003, with its registered address in Ypsilanti, Michigan. Its initial members were Murray Aviation, Inc., a Michigan corporation, and HBJ Leasing, LLC, a Michigan LLC, which each owned 50% of plaintiff. Plaintiff was formed for the purpose of engaging in the activity of aircraft leasing and operations, and prior to 2005 (the year of the subject use tax assessment) had purchased at least two aircraft and leased them Murray Air, Inc. ("Murray," formerly known as Murray Aviation, Inc).
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> In April 2005, plaintiff purchased a DC-8 aircraft and simultaneously entered into a lease agreement with Murray. Murray previously had arranged to lease the aircraft from another company, had taken possession of the aircraft in January of 2005, and had maintained uninterrupted possession since that date; the deal subsequently fell through, leading Murray to approach plaintiff about purchasing the DC-8 and leasing it to Murray.
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> In 2006, defendant issued a use tax assessment in the amount of $414,000, plus a penalty of $103,500 and statutory interest, for use tax on the purchase of the aircraft. Plaintiff filed a petition with the Tribunal in 2007, asserting that it was not subject to the use tax, and later moved the Tribunal for Summary Disposition pursuant to MCR 2.116(C)(10).

[1] Plaintiff was formerly known as Celtic Leasing, LLC.

No further action was taken on the case until June of 2011. On June 10, 2011, the Tribunal granted plaintiff's motion for summary disposition, holding that plaintiff "did not incur a use tax liability when it purchased and simultaneously leased an aircraft to a related entity that had possession and control over such aircraft at the time." The Tribunal further found that the fact that plaintiff "did not have possession of the aircraft and did not, at any time, take responsibility for such things as repairs and maintenance, insurance, potential benefit of warranties, or any options for use thereof" compelled the conclusion that plaintiff did not "use" the aircraft within the meaning of the UTA.

Defendant moved the Tribunal for Reconsideration in July of 2011. The Tribunal granted that motion in August of 2011 and reversed its previous decision, entering judgment in favor of defendant for the full amount of the assessment. The Tribunal considered this Court's decision in *Fisher & Co v Dept of Treasury*, 282 Mich App 207; 769 NW2d 740 (2009), a decision entered after the parties had filed briefs but prior to the Tribunal's rendering of its initial opinion and judgment, and concluded that, pursuant to *Fisher*, plaintiff "did use the aircraft as the term is defined in the Michigan Use Tax Act and was, therefore, properly assessed use tax. Thus, [defendant] has demonstrated a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected." The Tribunal denied plaintiff's motion for reconsideration in October of 2011. This appeal followed.

II. STANDARD OF REVIEW

The Tribunal issued a decision that petitioner was liable for use tax in the amount of $414,000 in 2006. Petitioner argued in later proceedings that it was not liable for use tax, but never raised the alternative argument that in any event the Tribunal erred in calculating the tax. Because petitioner forfeited this issue by failing to timely assert it before the Tribunal, this Court reviews the issue for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

III. DISCUSSION

The Tribunal assessed petitioner $414,000, plus interest and penalty, in use tax. Petitioner argues that this amount was not supported by competent, material, and substantial evidence. The purchase agreement attached to the parties' stipulated facts established the purchase price of the aircraft at $2,700,000. The use tax rate is 6%. MCL 205.93(1). Six percent of the purchase price of the aircraft is $162,000.

Respondent argues that petitioner has waived this issue, and additionally that the Tribunal is not limited to the purchase price in determining value. We disagree with respondent, and agree with petitioner that the amount assessed by the Tribunal was not supported by competent, material, and substantial evidence.

MCL 205.93 (1) provides in relevant part:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of *the price* of the property or services. [Emphasis added.]

"Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on *a percentage of the purchase price of the property in question*." *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 19 n 3; 678 NW2d 619 (2004), quoting 85 CJS2d, Taxation, § 1990, p 950 (emphasis added).

The Tribunal's October 5, 2011 order challenged by petitioner in its original appeal affirms the original assessment of $414,000 in use tax, but does not explain why that amount was determined to be correct.[2] We conclude that given the disparity between the amount of use tax imposed and the amount that equals 6% of the purchase price, this case should be remanded to the Tribunal with instructions that the Tribunal recalculate the use tax and provide a statement explaining its calculation.

Further, although petitioner failed to preserve this issue for appellate review, we decline to find waiver of the issue. Petitioner originally prevailed before the Tribunal in its motion for summary disposition on the ground that the aircraft was not subject to use tax. The Tribunal then granted respondent's motion for reconsideration, reversed its prior decision, and granted summary disposition to respondent. The Tribunal then entered a final judgment in the amount of $414,000 plus interest and penalties. Prior to the grant of reconsideration, there was no need for petitioner to challenge the amount of the assessment. We decline to find that petitioner conclusively waived its opportunity to challenge the amount of the assessment here under such a procedural posture. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65 n 4; 642 NW2d 663, 668 (2002) ("[W]aiver" connotes an intentional abandonment of a known right.).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra

[2] The original assessment, attached to a brief in the tribunal's record, gave no explanation for the amount of use tax imposed on petitioner's transaction.